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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR.

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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Otto Kerner, Jr., pursuant to Rule 58(2) of the Rules of this Court, petitions the Court for rehearing of its order of June 17, 1974, denying his petition for a writ of certiorari.

Petitioner submits that there has occurred, in the words of Rule 58, an "intervening circumstance . . . of substantial . . . effect" since the denial of certiorari: namely, that the United States, in an abrupt reversal of position, claimed for the first time in its reply brief in *United States* v. *Nixon,* Nos. 73-1766, 73-1834, that

there is no constitutional distinction between the amenability of a President and of an Article III judge to criminal indictment and prosecution. Neither petitioner, nor, we respectfully submit, the Court, could have foreseen at the time certiorari was under consideration in this case the centrality of this issue in *United States* v. *Nixon.*

I. THE LAW OF REHEARING

The Court has granted rehearing on a denial of certiorari in cases strikingly like this one. For example, in *Pickett* v. *Union Terminal Co.,* 313 U.S. 591 (1941) (certiorari denied), 314 U.S. 704 (1941) (rehearing granted and certiorari granted), 315 U.S. 386 (decision on the merits *sub nom. Williams* v. *Jacksonville Terminal Co.*) (1942), the rehearing was granted apparently because the decisive issue in *Pickett* assumed enhanced importance when it was found to have been the subject of dispute in another proceeding.

In *Forgett* v. *United States,* 383 U.S. 926 (1966), 390 U.S. 203 (1968), certiorari was first denied and then granted and the conviction vacated. In the interim, the Court had decided to grant certiorari and reverse in *Haynes* v. *United States,* 390 U.S. 85 (1968), deciding a constitutional issue found also to be dispositive in *Forgett.*

Alderman v. *United States,* 394 U.S. 165 (1969), was the product of a rehearing after denial of certiorari, followed by a per curiam order (390 U.S. 136 (1968)), followed by plenary argument. See also, *Reid* v. *Covert,* 351 U.S. 487 (1956), 352 U.S. 901 (1956), 354 U.S. 1 (1956).

There is, in sum, wisdom in Justice Frankfurter's observation:

> The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process.

City of Detroit v. *Murray Corp.*, 357 U.S. 913, 915 (1958) (dissenting opinion).

II. THE INDICTABILITY OF A FEDERAL OFFICER AND THE UNITED STATES' REVERSAL OF POSITION

One of the issues raised by petitioner Kerner and decided adversely to him by the Court of Appeals (493 F.2d at 1144) is that Article I, Section 3, Clause 7 of the Constitution, together with the lifetime tenure provision of Article III, proscribes criminal indictment and prosecution of a federal judge prior to his removal by the Congress. In its brief in the Court of Appeals in this case, the United States took the position that the Founders "intended to exempt the President from indictment prior to impeachment." The United States sharply distinguished the case of a federal judge, arguing that "the reason advanced for the immunity of the Chief Executive does not even exist insofar as federal judges are concerned."[1]

Now, in *Nixon*, the United States takes squarely the position that there is no constitutional distinction at all between the President and a judge in respect of their indictability. Relying heavily upon the opinion of the Court of Appeals in this case (*United States* v.

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[1] Government's Brief in the Court of Appeals, p. 55. The government also distinguished the situation of a vice-president in its Brief in the Maryland District Court in the *Agnew* case (Civil Action No. 73-965 (D. Md. 1973)).

Isaacs, 493 F.2d 1124 (7th Cir. 1974)), the United States takes the position that "the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President." (G. Reply Br. p. 26) The United States argues that *Isaacs* is controlling because the Court of Appeals' opinion rejecting Kerner's claim of immunity "made no effort to distinguish the President from the sweep and force of this statement." (G. Reply Br. p. 27) Clearly, Article I, Section 3, Clause 7 makes no such distinction. Having stated that the clause covers both the President and a federal judge, the government proceeds to acknowledge that the issue is not free from doubt and that the President's argument for immunity has substantial support (G. Reply Br. p. 24). In short, there is a tacit concession that this issue of burning public concern and of highest importance in the law of separation of powers, merits a decision by the one body—this Court—constitutionally empowered to decide it.

The government does observe in *Nixon* that this Court need not reach the issue of the President's indictability. However, the President's immunity has been forcefully argued as the principal reason why the President may not be named as an unindicted co-conspirator. This Court, therefore, may or may not reach the issue of immunity and construe the meaning of Article I, Section 3, Clause 7. However, if this Court reaches that issue and if this Court agrees with the well-founded assertion of the United States that there is no difference between the President and a judge, then such a decision will have a direct and dispositive impact upon Kerner's case.

At the time that Kerner filed his petition for certiorari, the position of the United States was that a

federal judge is amenable to criminal prosecution but that the President is not. Only recently, in its reply brief in the *Nixon* case, has the government changed its position.

Respectfully submitted,

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Certificate of Counsel

Pursuant to Rule 58(2) of the Rules of this Court, I hereby certify that this petition for rehearing is presented to the Court in good faith and not for delay. No stay of execution of sentence will be sought. I also certify that this petition is restricted to the ground of an intervening circumstance occurring subsequent to the Court's order denying petitioner's petition for a writ of *certiorari*.